

Ronald Ryan  
Attorney at Law  
1413 E. Hedrick Drive  
Tucson, Arizona 85719  
(520)298-3333 fax: (520)743-1020  
[ronryanlaw@cox.net](mailto:ronryanlaw@cox.net)  
AZ #018140 Pima County #65325

UNITED STATES BANKRUPTCY COURT  
DISTRICT OF ARIZONA TUCSON

In re:

DAVID CONNELLY and ELIZABETH  
CONNELLY,  
Debtors

DAVID CONNELLY and ELIZABETH  
CONNELLY,  
Plaintiff

vs.

BANK OF AMERICA, N.A.,  
Defendant

Adversary No. 4:10-ap-02292-EWH

Case No. 09-33553-TUC-EWH

**DEBTOR'S COMPLAINT TO AVOID  
DEFENDANT'S SECONDARY LIEN ON  
REAL ESTATE**

Chapter 13

COME NOW, David Connelly and Elizabeth Connelly, Debtor and Plaintiff, who file this Debtor's Complaint to Avoid Defendant's Secondary Lien on Real Estate, complaining against Bank of America, N.A. ("B of A"), Defendant. B of A is reputed to be the secondary lienholder according to the records of the Pima County Recorder. Plaintiff presents unto the Court as follows:

1. This Court has jurisdiction over this matter pursuant to 28 U.S.C. §§157 and 1334 and B.R. 7001, et seq. Pursuant to B.R. 3007(b), an Objection to Claim may be filed as an Adversary Proceeding. Venue is appropriate in this district pursuant to 28 U.S.C. §1408 and 1409. This matter is a core proceeding.

2. According to official published records of the Arizona Corporation Commission ("ACC"), B of A is a nationally chartered banking association, with a domicile of North Carolina, whose Arizona Statutory Agent is C T Corporation System 2394 E

1 Camelback Rd Phoenix, AZ 85016, according to official records published by the ACC.

2 3. Plaintiff is the owner of a piece of property, hereinabove and below called,  
3 "Debtor's Residence", or the "Property," which Debtors have claimed as their exempt real  
4 property homestead, as follows:

5 LOT 104, OF FINAL PLAT OF GLADDEN FARMS BLOCK 12, ACCORDING  
6 TO THE PLAT OF RECORD IN THE OFFICE OF THE COUNTY RECORDER  
7 OF PIMA COUNTY, ARIZONA, RECORDED IN BOOK 57 OF MAPS, PAGE  
8 76, AND AS MORE COMMONLY KNOWN AS 1085 W DENIER DR MARANA  
AZ 85653

9 4. Debtor has had the property professionally appraised. The Appraisal Report  
10 provided a value of \$210,000.00, the first page of which is attached hereto as Exhibit A. The  
11 entire Report is available to any party upon request.

12 5. The party claiming to own the Primary Mortgage Note, or claiming to be the  
13 Servicer or other party with actual authority from the owner of said note to enforce the Note,  
14 is BAC Home Loan Servicing, L.P. fka Countrywide Home Loans Servicing, L.P. ("BAC"),  
15 according to statements sent to Plaintiff, and according to records of MERS published to the  
16 public. The amount claimed to be owed on the primary mortgage is \$296,154.00, pursuant to  
17 statements received and reports of the major credit reporting agencies. The Deed of Trust  
18 upon which said Primary Lien is claimed to be based by BAC was recorded at docket 12521,  
19 page 9100, on 3/31/2005, with the Pima County Recorder. This purported claim is referred  
20 to as the "Primary Lien." A copy of this Primary Lien Deed of Trust is available to any party  
21 upon request.

22 6. The amount claimed to be owed by Plaintiffs to B of A purportedly secured by the  
23 Secondary Deed of Trust is \$84,099.00, according to statements received and reports of the  
24 major credit reporting agencies. This purported Secondary Deed of Trust was recorded at  
25 docket 12740, page 3785, on 2/13/2006. This purported lien is referred to as the "Secondary  
26  
27  
28

1 Lien." A copy of the Secondary Deed of Trust is attached to the Citimortgage and is available  
2 to any party upon request.

3 7. The value of Debtor's Residence is less than the amount owed on the Primary  
4 Lien. Based on the definition of "allowed secured claim" derived from 11 U.S.C. §506(a) and  
5 (d); and pursuant to the modification provisions allowed under 11 U.S.C. §1322(b)(2),  
6 Plaintiffs ask for Judgment extinguishing the Secondary Lien on their property. The value of  
7 Debtor's Residence after deducting the amount owed on the Primary Lien does not leave any  
8 value to provide the Secondary Lien any interest at all in the Property. Therefore, there is  
9 nothing upon which a security interest can attach in favor of the Secondary Lien, and it is  
10 therefore unsecured.  
11

12 8. Debtor asks that the Secondary Lien be avoided. Debtor asks that an Order be  
13 entered that the Secondary Lien Proof of Claim is unsecured.  
14

### 15 **MEMORANDUM IN SUPPORT OF PLAINTIFF'S POSITIONS**

16 Issue: Can a Chapter 13 Debtor extinguish a purported lien on Debtor's Residence and  
17 obtain a ruling that the lienholder has no "allowed secured claim" under 11 U.S.C. § 506 (a),  
18 despite the antimodification provisions of § 1322(b)(2)?  
19

20 At least six Circuit Courts have addressed the issue and all have adopted the view that  
21 the holder of a purported junior lien on a Debtor's residence is wholly unsecured mortgage on  
22 a debtor's principal residence is not entitled to the protection of § 1322(b)(2), when the value  
23 of that residence is less than, or equal to, the amount owed on superior liens. *In re Zimmer*,  
24 313 F.3d 1220 (9th Cir. 2002); *In re Lane*, 280 F.3d 663, 667-69 (6th Cir. 2002); *Pond v.*  
25 *Farm Specialist Realty* (In re Pond), 252 F.3d 122, 126 (2d Cir. 2001); *Tanner v. FirstPlus*  
26 *Fin., Inc.* (In re Tanner), 217 F.3d 1357, 1359-60 (11th Cir. 2000) *In re McDonald*, 205 F.3d  
27 606 (3rd Cir. 2000); *Bartee v. Tara Colony Homeowners Ass'n* (In re Bartee), 212 F.3d 277,  
28

1 2000 WL 621400 (5th Cir. 2000). Other Courts and opinions that are in accord with this  
2 majority view include: *In re Lam*, 211 B.R. 36 (B.A.P. 9th Cir. 1997). *Western Interstate*  
3 *Bancorp v. Edwards* (In re Edwards), 245 B.R. 917, 921 (Bankr. S.D. Ga. 2000); *In re*  
4 *McCarron*, 242 B.R. at 483 *Scheuer v. Marine Midland Bank* (In re Scheuer), 213 B.R. 415,  
5 418 (Bankr. N.D.N.Y. 1997); *In re Geyer*, 203 B.R. 726, 729 (Bankr. S.D. Cal. 1996); *In re*  
6 *Lee*, 161 B.R. 271, 273 (Bankr. W.D. Okla. 1993); *In re Hornes*, 160 B.R. 709, 714 (Bankr.  
7 D. Conn. 1993).

9 WHEREFORE, PREMISES considered, David Connelly and Elizabeth Connelly,  
10 Debtor and Plaintiff, pray that this Court enter Judgment avoiding the Secondary Lien on  
11 Debtor's Residence, and deeming that the Secondary Lien Proof of Claim is unsecured.  
12 Debtors request all other general and specific relief to which they may show themselves  
13 entitled under the facts as plead or proven in Court.  
14

15  
16 Respectfully submitted,  
17 /s/ Ronald Ryan  
18 Ronald Ryan, Attorney for Debtors  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28